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In the Supreme Court of the United States

OCTOBER TERM, 1959.

No. 1834

COMMONWEALTH ENGINEERING COMPANY OF OHIO,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

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TABLE OF CONTENTS.

Citations to Opinions Below	1
Jurisdiction	1
Law Question Presented	2
Statute Involved	2
Statement of the Case	3
Argument	6
I. The Decision of the Court of Claims Is In Conflict With Decisions of This Court	6
A. The Decision Below	6
B. A Threat of Termination to Coerce a Contractor to Give Up His Rights Constitutes Duress	7
Decisions of This Court Control: They were ignored	7
C. Exhaustion of Administrative Remedies	8
Right of Appeal Denied	10
II. Importance of the Question	11
Conclusion	12
APPENDIX:	
Opinion and Judgment of the Court of Claims	13
Denial of Rehearing	20

TABLE OF AUTHORITIES.

Cases.

Allied Contractors v. United States, 124 F. Supp. 366, 129 C. Cls. 400 10

Barnette v. Wells Fargo National Bank, 270 U. S. 438 ..... 6, 9

Freund v. United States, 260 U. S. 60, 43 S. Ct. 70, 67 L. Ed. 131 ..... 6, 7-8

Fruhauf Southwest Garment Co. v. United States, 126 C. Cls. 51, 111 F. Supp. 945 7

Robertson v. Frank Brothers Company, 132 U. S. 17, 23, 10 S. Ct. 5, 33 L. Ed. 236 (1889) 7

Silas Mason Company, Inc. v. United States, 62 F. Supp. 432, 105 C. Cls. 27 10

United States v. Joseph A. Holpuch Co., 328 U. S. 234, 66 S. Ct. 1000, 90 L. Ed. 1192 ..... 6, 8

Universal Sportswear, Inc. v. United States, 180 F. Supp. 391 (1959) 8, 11

Texts.

17 A *Am. Jur.* 572 (Duress § 11) 7

17 A *Am. Jur.* 583 (Duress § 19) 9

17 A *Am. Jur.* 598 (Duress § 32) 10

5 *Williston on Contracts* (Revised Ed.) § 1624 10

Statutes.

28 U. S. C., Section 1255(1) 1

28 U. S. C., Section 1491 ..... 2, 6

In the Supreme Court of the United States

OCTOBER TERM, 1959.

No. ----------.

COMMONWEALTH ENGINEERING COMPANY OF OHIO,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Claims, which was entered in the above entitled case on January 20, 1960.

CITATIONS TO OPINIONS BELOW.

The opinion of the Court of Claims, which is printed in the Appendix hereto at page 13, is reported in 180 F. Supp. 396.

JURISDICTION.

The judgment of the Court of Claims was entered on January 20, 1960, and is printed in the Appendix hereto at page 20. A timely motion for rehearing was denied on April 6, 1960. Appendix page 20. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1255(1).

LAW QUESTION PRESENTED.

Where a small government contractor, who was not in default, was coerced by threats of the government contracting officer into signing a settlement agreement which decreased the contract price and took away the contractor's right of price revision and appeal and by threats of the contracting officer to invoke default procedure and relet the contract to another contractor at a higher price and thereby throw the contractor into bankruptcy, and the Government contracting officer changed the contract settlement in his own handwriting so as to take away the contractor's right of appeal and forced the contractor to sign the changed agreement or face bankruptcy by the Government reletting the contract and charging the contractor with the increased price of the new contractor, may the contractor avoid such illegal settlement on the ground of duress and is it entitled to relief in the Court of Claims to restore its losses through being deprived of rights of appeal by reason of this illegal forced settlement under threats by the Government contracting officer to relet the contract and charge the contractor with the second contractor's charges?

STATUTE INVOLVED.

The statute relied upon in this case is 28 U. S. C., § 1491, which provides:

> "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States:
>
> (1) Founded upon the Constitution; or
>
> (2) Founded upon any Act of Congress; or
>
> (3) Founded upon any regulation of an executive department; or

(4) Founded upon any express or implied contract with the United States; or

(5) For liquidated or unliquidated damages in cases not sounding in tort." June 25, 1948, c. 646, 62 Stat. 940.

STATEMENT OF THE CASE.

On May 20, 1952, the petitioner entered into a contract with the Air Force whereby the petitioner agreed to design and fabricate an experimental and new electronic device, never built before, known as a noise spectrometer for a contract price of $95,711.72. The contract provided for upward or downward price revision with a ceiling price of $104,112.70. By supplemental agreement the total contract price was increased to $102,447.22, with a ceiling price of $111,148.29.

The apparatus was completed in July, 1955. It was tested in August and September, 1955, by respondent's agents and found satisfactory. As a result of those tests, the completed apparatus was approved for delivery to Wright-Patterson Air Force Base, subject to final tests at the latter's laboratories. There, with the aid of special instruments which were available only at respondent's laboratories, respondent's personnel determined that operation of the apparatus revealed certain erratic characteristics which were attributable to the inclusion of certain amplifiers previously approved and required by respondent. The alleged erratic mechanism was selected by the Government and installed by the contractor on the Government's orders. The responsibility for its function was the Government's.

The petitioner was advised by the contracting officer that changes involving additional costs of $10,000.00 would

be required to correct the defects of the Government's own selection.

On March 26, 1956, a conference was held at the contracting officer's office between petitioner and respondent's representatives to negotiate a close-out of the contract. At that conference the contracting officer told the petitioner that the respondent desired to terminate the contract for the convenience of the Government and would accomplish completion of the contract at respondent's own laboratories if the petitioner would agree to such termination and a reduction in the contract price of $10,000.00. At that conference the contracting officer threatened that, if petitioner failed to agree to that procedure, he would have the contract terminated for default, and the contract would be relet to another contractor and the petitioner would be charged with any additional cost, which would bankrupt the petitioner.

After the conference, petitioner's president wrote a letter, dated April 3, 1956, to respondent's representatives setting forth the terms of the termination of the contract for the convenience of the Government. Another conference was held in the contracting officer's office on April 3, 1956.

At that conference the contracting officer told the petitioner's president that the letter was not satisfactory because of the inclusion of a right of contract price redetermination and appeal. The contracting officer revised the letter in his own handwriting by striking out the paragraph reserving petitioner's right of contract price redetermination and appeal and writing in the language which the contracting officer demanded the petitioner to incorporate in its letter. (A copy of the letter of April 3, 1956, as revised by the handwriting of the contracting officer, is attached to the first amended petition as Exhibit A.)

The contracting officer then told the petitioner's president that he must submit a letter in accordance with his revision or he would terminate the contract for the petitioner's default, which would bankrupt the petitioner. At that time the petitioner was not in default, since it had until June 26, 1959, within which to complete its contract.

However, in the precarious financial situation in which the petitioner found itself, it had no choice but to accept the contracting officer's demands. The petitioner's costs in performing the experimental contract amounted to $144,564.38. As a result of incurring costs substantially in excess of the contract price for respondent's benefit and with its approval, the petitioner had been forced to borrow $50,000.00 from its bank in addition to using $20,000.00 of its own funds and $74,000.00 which it had received from respondent as partial payments. The bank was pressing petitioner for repayment of the loan.

It was doubtful whether the degree of accuracy of performance which respondent's project engineer was demanding could ever be obtained with the new components which respondent's engineers demanded for the apparatus. Therefore, if the contract were terminated and relet to another contractor (and petitioner charged with any higher price which respondent might pay to the new contractor) petitioner could easily have been thrown into bankruptcy.

The petitioner was thus coerced into signing the letter as revised by the contracting officer.

After being coerced into agreeing to the above termination settlement by the contracting officer's threat to terminate the contract for default, the petitioner sought relief from the Air Force Contract Adjustment Board under the First War Powers Act. The Air Force Contract Adjustment Board held it did not have jurisdiction to review

the case. Petitioner then filed an action in the United States District Court for the Southern District of Ohio, which was dismissed for want of jurisdiction. This action was then filed in the Court of Claims. Jurisdiction over the case was conferred on the Court of Claims by 28 U. S. C. § 1491. The Court of Claims dismissed the petition on ground that it failed to state a claim upon which relief could be granted.

ARGUMENT.

I. THE DECISION OF THE COURT OF CLAIMS IS IN CONFLICT WITH DECISIONS OF THIS COURT.[1]

A. The Decision Below.

The decision by the Court of Claims in this case posed the following dilemma: The settlement agreement was either valid or it was invalid because of duress. If there was no duress, the agreement was valid and petitioner was bound by it. If there was duress, which would make the agreement invalid, it was no agreement at all but merely "a unilateral decision of the contracting officer." In the latter case, the Court of Claims held the petitioner could not recover because it had failed to exhaust its administrative remedies by appealing to the Secretary of the Air Force as provided in the disputes clause of the contract. After posing that dilemma, the Court of Claims held: (1) there was no duress, and (2) even if there had been duress, the complaint must be dismissed on ground that petitioner had failed to exhaust its administrative remedies. We believe the decision is erroneous on both grounds.

---

[1] E.g., *Freund v. United States*, 260 U. S. 60, 43 S. Ct. 70, 67 L. Ed. 131; *Barnette v. Wells Fargo National Bank*, 270 U. S. 438; *United States v. Joseph A. Holpuch Co.*, 328 U. S. 234, 66 S. Ct. 1060, 90 L. Ed. 1192.

B. A Threat of Termination to Coerce a Contractor to Give Up His Rights Constitutes Duress.

Three elements are necessary to constitute duress:

> "(1) that one side involuntarily accepted the terms of another; (2) that the circumstances permitted no other alternative; and (3) that said circumstances were the result of coercive acts of the opposite party. *United States v. Bethlehem Steel Corp.*, 315 U. S. 289, 301, 62 S. Ct. 581, 86 L. Ed. 855; *French v. Shoemaker*, 14 Wall. (U. S.) 314, 322." *Fruhauf Southwest Garment Co. v. United States*, 126 C. Cls. 51, 111 F. Supp. 945, 970.

The complaint which was filed in the Court of Claims shows that each of those elements was present in this case, i.e., (1) the petitioner involuntarily accepted the respondent's terms, (2) the circumstances permitted no other alternative as petitioner would have been bankrupted if it had refused to accept the defendant's terms, and (3) the circumstances were the result of coercive acts of the respondent, since petitioner had no reason to fear bankruptcy except for the threats of the contracting officer to invoke the default procedure, in bad faith, when petitioner was not in default. "When the duress has been exerted by one clothed with official authority, or exercising a public employment, less evidence of compulsion or pressure is required. * * *" *Robertson v. Frank Brothers Company*, 132 U. S. 17, 23, 10 S. Ct. 5, 33 L. Ed. 236 (1889). "Under the modern view, any wrongful threat which actually puts the victim in such fear as to compel him to act against his will constitutes duress." 17 A *Am. Jur.* 572 (Duress § 11).

DECISIONS OF THIS COURT CONTROL: THEY WERE IGNORED.

The use of a threat of termination to force a contractor to give up his rights under a government contract clearly constitutes duress. In *Freund v. United States*, 260

U. S. 60, 43 S. Ct. 70, 67 L. Ed. 131 (1922), the contractor, faced with a threat of termination and default of its performance bond, was forced to provide additional services at the contract price. In commenting upon the choice forced upon the contractor, Chief Justice Taft, speaking for a unanimous Court, said (at 260 U. S. 70):

> "We cannot ignore the suggestion of duress there was in the situation, or the questionable fairness of the conduct of the Government, aside from the illegality of the construction of the contract insisted on * * *."

In *Universal Sportswear, Inc. v. United States*, 180 F. Supp. 391 (1959), **the Court of Claims held a threat by a contracting officer to invoke the default procedure constituted duress where the contractor was not in default and the threat was made to coerce the contractor into signing a settlement agreement.** The *Universal Sportswear* case cannot be distinguished from this case.

C. Exhaustion of Administrative Remedies.

The petitioner, of course, recognizes that normally failure to exhaust the administrative remedies provided in government contracts precludes a contractor from obtaining relief in the Court of Claims. However, where there is justifiable excuse or in the case where the appeal procedure is inadequate or unavailable, **the contractor need not pursue and exhaust his administrative remedies before resorting to the court.** *United States v. Joseph A. Holpuch Co.*, 328 U. S. 234, 66 S. Ct. 1000, 90 L. Ed. 1192; *Universal Sportswear, Inc. v. United States*, 180 F. Supp. 391 (Ct. Cl., 1959).

In this case the contracting officer coerced the contractor into giving up its right of price revision and ap-

peal by threatening to invoke the default procedure—and thereby bankrupt the contractor—when the contractor was not in default. In other words, the contractor was coerced into signing a settlement agreement by which it gave up its administrative remedies under duress.

Article 21(g) of the contract provides for an appeal where the contracting officer determines the amount due to the contractor as a termination settlement under Article 21(c) or 21(e) of the contract. In this case the amount due the contractor was determined by an agreement between the contractor and contracting officer pursuant to Article 21(d) of the contract. There is no appeal from a determination under Article 21(d). However, the Court of Claims held a settlement agreement which was procured from the contractor by duress on the part of the contracting officer "could only amount to a unilateral decision of the contracting officer" from which an appeal would lie. **We believe the Court of Claims was in error in regarding an agreement which was extorted by duress as absolutely void rather than voidable.** With regard to the effect of duress, 17 A *Am. Jur.* 583 (Duress § 19) states:

> "* * * duress, like fraud, rarely becomes material as such, except where a contract or conveyance has been made which the maker wishes to avoid, and it is the well-established general rule that in such cases the duress inducing the making, while rendering the contract or conveyance voidable at the option of the persons coerced, does not render it absolutely void, and it is susceptible of ratification express or implied. It is, like other voidable contracts, valid until it is avoided by the person entitled to avoid it."

That rule has been followed by this Court. In *Barnette v. Wells Fargo National Bank*, 270 U. S. 438 (1926), the Court said:

"Acts induced by duress such as is here relied on, which operates only on the mind and falls short of actual physical compulsion, are not void in law, but are voidable only, at the election of him whose act was induced by it. *Andrews v. Connolly*, 145 Fed. 43, 46; *Miller v. Davis*, 52 Colo. 485, 494; *Eberstein v. Willetts*, 134 Ill. 101; *Fairbanks v. Snow*, *supra*; *Miller v. Lumber Co.*, 98 Mich. 163; *Oregon & P. R. R. Co. v. Forrest*, 128 N. Y. 83 * * *" (p. 444).

For a similar statement of the rule, see 5 *Williston on Contracts* (Revised Ed.) § 1624.

RIGHT OF APPEAL DENIED.

The settlement agreement which the petitioner was coerced into signing by the contracting officer's duress took away the petitioner's right of contract price redetermination and appeal. Clearly this was a voidable agreement, *i.e.* it was not absolutely void but was valid until (and unless) it was set aside by the Court of Claims on ground of duress. It could not be regarded as a "unilateral decision of the contracting officer," as was held by the Court below. It therefore prevented the petitioner from pursuing its administrative remedies by appealing to the Secretary of the Air Force.

The administrative remedies provided by the contract pertained only to disputed questions of fact. *Allied Contractors v. United States*, 124 F. Supp. 366, 129 C. Cls. 400; *Silas Mason Company, Inc. v. United States*, 62 F. Supp. 432, 105 C. Cls. 27. What constitutes duress is a matter of law. 17 A *Am. Jur.* 598 (Duress § 32). If the petitioner had appealed to the Secretary of the Air Force, the Secretary clearly would not have had jurisdiction to set aside the settlement agreement on ground of duress. Whether there was duress was a question of law which could only be decided by the Court of Claims. As the

duress rendered the settlement agreement voidable, rather than void, it was valid until set aside by the Court and prevented the Secretary from deciding any disputed questions of fact until it was set aside. Consequently, the petitioner was precluded from pursuing any of the administrative remedies provided by the contract before going to the Court of Claims. **There were no administrative remedies to exhaust or pursue.**

II. IMPORTANCE OF THE QUESTION.

The question presented in this petition is obviously of great importance in the administration of government contracts. If the decision in this case is allowed to stand, every small government contractor will be at the mercy of the contracting officer whenever a dispute arises. As the Court of Claims said in *Universal Sportswear, Inc. v. United States*, 180 F. Supp. 391, **a small company which has only one government contract obviously cannot afford to suffer a default termination and the excess costs which may be paid to another contractor.** That is especially true where the contract calls for the fabrication of an experimental device, as in this case.

If a contracting officer of the United States Government—with all the powers which he possesses—can coerce a contractor into giving up its right of price revision and appeal under a threat of being thrown into bankruptcy, it is high time to correct the situation so as to provide protection for small contractors on which the Government must depend in large numbers in peace and war. The United States Government cannot afford to let its employees engage in sharp and coercive practices that would not be tolerated in dealings in civil life between business men. The only hope for correction of this arbitrary and disastrous situation is in this Court.

CONCLUSION.

As shown in the above argument, this petition for certiorari should be granted because of the importance of the question presented and the conflict of the decision below with decisions by this Court.

Respectfully submitted,

HARRY A. TOULMIN, JR.,
Counsel for Petitioner.

Of Counsel:

GEORGE W. STENGEL,
TOULMIN & TOULMIN.

APPENDIX.

OPINION AND JUDGMENT OF THE COURT OF CLAIMS.

IN THE UNITED STATES COURT OF CLAIMS

No. 16-59

(Decided January 20, 1960)

THE COMMONWEALTH ENGINEERING COMPANY OF OHIO v. THE UNITED STATES

Mr. H. A. Toulmin, Jr., for the plaintiff. *Mr. Folsom E. Drummond* and *Mr. George W. Stengel* were on the brief.

Mr. Clare E. Walker, with whom was *Mr. Assistant Attorney General George Cochran Doub*, for the defendant.

ON DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED PETITION

LARAMORE, *Judge*, delivered the opinion of the court:

Plaintiff's petition and exhibits attached thereto disclose that on May 20, 1952, plaintiff entered into a negotiated contract with the Air Force whereby the plaintiff agreed to design and fabricate a certain electronic device known as a noise spectrometer for the contract price of $95,711.72. The contract provided for upward or downward price revision, with a ceiling price of $104,412.70. By supplemental agreement, the total target contract price was increased to $102,447.22 with a ceiling price of $111,148.29.

Subsequently plaintiff began performance of the contract and the time of contract delivery date was extended from time to time to June 26, 1956.

The apparatus was completed in July 1955 and tested in August and September 1955 by defendant's agents and found satisfactory. Further tests at Wright-Patterson Air Force Base, as provided for in the contract, revealed an erratic performance of the item and defendant refused to accept delivery. Plaintiff was advised that changes involving additional costs of $10,000 would be required.

The parties met at a conference to negotiate a settlement of the dispute. At that conference defendant's agents told plaintiff that the defendant desired to terminate the contract for the convenience of the Government and would accomplish completion of the contract at defendant's own laboratories if the plaintiff would agree to such termination and a reduction in contract price of $10,000. At that conference, plaintiff alleges, defendant's agent threatened that, if plaintiff failed to agree to this procedure, he would have the contract terminated for default and the contract would be relet and the contractor would be charged with any additional costs. Plaintiff alleges this would have bankrupted the claimant contractor.

After the conference plaintiff's president wrote a letter, dated April 3, 1956, to defendant's representatives setting forth the terms of a termination of the contract for the convenience of the Government. Another conference was held wherein plaintiff's president was told that the letter was unsatisfactory because of the inclusion of a right of contract price redetermination and appeal. The letter was then revised by striking out the portion objected to. Plaintiff then alleges defendant's agent told its president that he must submit a letter in accordance with the revision or he would terminate the contract for plaintiff's default. At this time, plaintiff alleges, it was not in default, having until June 26, 1956, within which to complete its contract.

Plaintiff claims that it acceded to claimant's demands for such termination under financial duress, but subse-

quently sought review of the action of defendant's agents by applying for relief to the Air Force Contract Adjustment Board in accordance with P.L. 921 (81st Congress, which amended the First War Powers Act of 1941, 55 Stat. 838, as amended by 64 Stat. 1257).

On November 15, 1957, the Air Force Contract Adjustment Board advised plaintiff it did not have jurisdiction to review the case under the First War Powers Act of 1941, *supra*.

Plaintiff then filed an action in the District Court, which was dismissed for want of jurisdiction. This suit followed.

The case arises on defendant's motion to dismiss the petition on the ground that the petition fails to state a claim upon which relief may be granted.

It is to be noted that plaintiff's petition alleges arbitrary action on the part of the Air Force Contract Adjustment Board in not taking jurisdiction of plaintiff's application for relief. Apparently plaintiff claims relief under the First War Powers Act, *supra*, and further claims this Court can review under the provisions of 41 U. S. C. § 321, which is the so-called Wunderlich Act. This Act gives finality to decisions unless the same are "fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or are not supported by substantial evidence."

However, as pointed out by the Government in its brief, the granting of such relief is not a matter of right, and denial of such relief gives rise to no legal or equitable claim. *Cooper Tire & Rubber Co. v. United States*, 138 C. Cls. 539; *Bolinders Co., Inc., v. United States*, 139 C. Cls. 677; *Waller v. United States*, 114 C. Cls. 640. Therefore, this could not be a compliance with the articles of the contract providing for claims and appeals as discussed later.

If the above were plaintiff's only allegation, its petition would fall on that premise alone. However, plaintiff

apparently invokes the jurisdiction of this court under 28 U. S. C. § 1491, which is the Act giving this Court its general jurisdiction. Under this circumstance we must look to the petition and contract to learn whether plaintiff's petition is sufficient.

Plaintiff seems to base its complaint on the proposition that the parties met and settled their dispute but that plaintiff was coerced into settlement by statement of Robert W. Logan, defendant's contracting officer. The statements complained of and allegedly attributed to Logan as set forth in the petition as the allegation of duress were "if claimant failed to agree to this procedure, he would have the contract terminated for claimant's default and the contract would be relet to another contractor and claimant charged with any higher price defendant would pay to the new contractor, which would have bankrupt [*sic*] the plaintiff."

Under this allegation the threshold question is whether this statement constituted duress. This question must be answered in the negative. As was stated in *Fruhauf Southwest Garment Co. v. United States*, 126 C. Cls. 51, at 62:

> It has become settled law that the mere stress of business conditions will not constitute duress where the defendant was not responsible for those circumstances.

As a matter of fact, something more must be present than threatened financial disaster. *DuPuy v. United States*, 67 C. Cls. 348, 381.

Plaintiff relies on the case of *Universal Sportswear, Inc. v. United States*, No. 411-57, decided March 4, 1959. However, the *Universal Sportswear* case is distinguished on the facts. In *Universal* more than a threat of financial disaster was present; *i.e.*, there was present the threat of

termination for default; rejection of all raincoats, claim for damages, confiscation of all raincoats; threat to make plaintiff pay for the cost of material, excess cost in reletting and default of bond. Additionally, this came after a promise that plaintiff would be paid, which promise was later broken by the forced amendment of the contract. As a matter of fact, in *Universal*, the contractor was forced to do additional work under the contract and nothing could be done about it. Here the contract was either terminated by agreement or there was no agreement. In either event, as pointed out later in this opinion, the Government was within its rights.

If, as alleged, defendant's agent threatened to terminate the contract for default, and plaintiff was in default, then of course the defendant was threatening to do what it had a right to do. *Milton Beatty v. United States*, Cong. No. 8-55, decided December 3, 1958, and cases cited therein.

If, as alleged, plaintiff was not in fact in default at that time, then the settlement if procured by duress could only amount to a unilateral decision of the contracting officer. In these circumstances the defendant still had the right to terminate for convenience of the Government, under either article 11(e) or article 21(a) of the contract.

Article 11(a) provides for termination for default of the contractor.

Article 11(e) of the contract provides:

> If, after notice of termination of this contract under the provisions of paragraph (a) of this clause, it is determined that the failure to perform this contract is due to causes beyond the control and without the fault or negligence of a Contractor pursuant to the provisions of paragraph (b) of this clause, such Notice of Default shall be deemed to have been issued pur-

suant to the clause of this contract entitled "Termination for Convenience of the Government," and the rights and obligations of the parties hereto shall in such event be governed by such clause. (*Except as otherwise provided in this contract, this paragraph (e) applies only if this contract is with a military department.*)

Termination for convenience of the Government was exactly what the Government wanted. In fact, plaintiff's petition alleges "at this conference defendant's agents told claimant's agents that they desired to effect a termination of the contract for the convenience of the Government, * * *"

Article 21(a) reads as follows:

> The performance of work under this contract may be terminated by the Government in accordance with this clause, in whole, or from time to time in part, whenever the Contracting Officer shall determine that such termination is in the best interests of the Government. Any such termination shall be effected by delivery to the Contractor of a Notice of Termination specifying the extent to which performance of work under the contract is terminated, and the date upon which such termination becomes effective.

Therefore, when the Government told plaintiff it was terminating for the convenience of the Government, which is what, from the allegations and exhibits, we believe occurred, the Government was well within its rights under the contract.

Under these circumstances article 21(d) of the contract permits the parties to agree upon the amount to be paid the contractor. In the event of failure to agree, the contracting officer has the right under article 21(e) to

determine the amount, if any, due the contractor. Article 21(g) provides for an appeal by the contractor under the "Disputes" clause, provided the contractor files a claim as provided for in paragraph (c) of article 21. Paragraph (c) provides for filing a claim within two years from the effective date of termination, unless one or more extensions in writing are granted.

So in this case, since the Government asked for something for which it had a legal right, the threat could not amount to duress and the resulting agreement is legal and binding. Inasmuch as we believe the agreement is binding, no further discussion is necessary. However, other reasons are present which show the invalidity of plaintiff's claim and are discussed below.

Since the termination was for the convenience of the Government and the resulting determination of the amount due was under article 21(e), plaintiff had the duty to appeal the decision. The contract then further provides in article 21(g) that the contractor must submit a claim within a certain time.

Plaintiff failed to file such a claim and under article 21(g) the amount found by the contracting officer is the only amount the contractor would be entitled to. Furthermore, even had plaintiff filed such a claim, no appeal was ever taken by plaintiff under the "Disputes" clause as provided and consequently plaintiff had failed to exhaust its administrative remedy. *United States v. Callahan Walker Construction Co.*, 317 U. S. 56; *United States v. Blair*, 321 U. S. 730.

Accordingly, we must hold that plaintiff has received all its rights under the contract, and the petition fails to state a claim upon which relief may be granted.

Defendant's motion is granted, and plaintiff's petition is dismissed.

It is so ordered.

REED, *Justice (Ret.)*, sitting by designation; LITTLETON, *Judge (Ret.)*; MADDEN, *Judge*; and JONES, *Chief Judge*, concur.

DENIAL OF REHEARING.

UNITED STATES COURT OF CLAIMS.

No. 16-59.

THE COMMONWEALTH ENGINEERING COMPANY OF OHIO.

v.

THE UNITED STATES

CLERK'S OFFICE

Washington, D. C., April 6, 1960

To Attorney of Record and Assistant Attorney General, and Commissioner

Sirs:

Please take notice that in the above-entitled cause there has been entered this day on the plaintiff's motion for rehearing the following order: OVERRULED.

Very truly yours,

WILLARD L. HART,

Clerk, Court of Claims.

LE COPY

FILED
JUL 26 1960
JAMES R. BROWNING, Clerk

No. 189

In the Supreme Court of the United States

OCTOBER TERM, 1960

COMMONWEALTH ENGINEERING COMPANY OF OHIO,
PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	5
Conclusion	9

CITATIONS

Cases:

Foreign Trade Management Co., Inc. v. *United States*, 109 C. Cls. 587	7
Freund v. *United States*, 260 U.S. 60	8
Fruhauf Southwest Garment Co. v. *United States*, 126 C. Cls. 51	6, 7, 8, 9
Hartsville Mill v. *United States*, 271 U.S. 43	7, 8
Holland Page, et al. v. *United States*, 120 C. Cls. 27	7
Kohen v. *H. S. Crocker Company*, 260 F. 2d 790	6
Mason v. *United States*, 84 U.S. 67	6, 7
Silliman v. *United States*, 101 U.S. 465	6, 7
Universal Sportswear, Inc. v. *United States*, 180 F. Supp. 391	7
United States v. *Blair*, 321 U.S. 730	8
United States v. *Callahan Walker Construction Co.*, 317 U.S. 56	9
W. R. Grimshaw Company v. *Nevil C. Withrow Co.*, 248 F. 2d 896, certiorari denied, 356 U.S. 912	6, 7

Statute:

First War Powers Act of 1941, 55 Stat. 838, as amended, 64 Stat. 1257	4

Miscellaneous:

5 Williston, *Contracts* (Rev. ed., 1937):	
§ 1603	6
§ 1606	6
§ 1608	6

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 189

COMMONWEALTH ENGINEERING COMPANY OF OHIO, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 13-20) is reported at 180 F. Supp. 396.

JURISDICTION

The judgment of the Court of Claims was entered on January 20, 1960. The petitioner's timely motion for rehearing was denied on April 6, 1960. The petition for a writ of certiorari was filed on June 27, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether, in the particular factual circumstances of this case, the Court of Claims properly ruled that there was no showing of duress on the part of the Government by which the petitioner could escape the binding effect of its settlement agreement.

2. Whether the Court of Claims correctly held that, even if there was duress invalidating the settlement agreement, the contract was thereby terminated for the convenience of the Government, and the petitioner was precluded from judicial relief because of its failure to exhaust its administrative remedies.

STATEMENT

The petitioner's action in the court below was dismissed for failure to state a claim upon which relief could be granted (Pet. App. 19-20). Hence, the facts in the case are to be accepted as stated in the amended petition and exhibits attached thereto filed in the Court of Claims.

On May 20, 1952, the petitioner entered into a negotiated contract with the Air Force whereby it agreed to design and fabricate an experimental electronic device known as a noise spectrometer for the contract price of $95,711.72, later amended to $102,447.22 (Pet. App. 13). The contract provided for upward or downward price revision with a ceiling price of $104,412.70, later amended to $111,148.29 (Pet. App. 13).

The petitioner subsequently commenced performance of the contract, the delivery date of which was

ultimately extended to June 26, 1956 (Pet. App. 13). Upon completion of the apparatus in July, 1955, tests disclosed erratic performance (Pet. App. 14). The Government refused to accept delivery, informing the petitioner that changes involving additional costs of $10,000 would be required to eliminate the defects (Pet. App. 14).

Subsequent to this determination, the parties met at a conference to negotiate a settlement of the dispute (Pet. App. 14). There the Government's agents told the petitioner's representatives that the Government desired to terminate the contract for its convenience, as provided in the contract. The petitioner was further informed that the Government would accomplish the required changes at its own laboratories with the result that the contract price would be lowered $10,000 (*i.e.*, from $102,447.22 to $92,447.22) (Pet. App. 14). The petitioner was also informed that, if it did not agree to this procedure, the contract would be terminated for default and relet, with excess costs, if any, charged to the petitioner's account (Pet. App. 14).

It was further alleged below that any such termination by default with the possibility of shouldering excess costs "would have bankrupted" the petitioner (Pet. App. 14). However, nowhere in its amended petition below did the petitioner charge that the Government was in any way responsible for its financial situation nor, indeed, that the Government was even aware of that situation.

The petitioner, claiming that it did so under threat of financial disaster, agreed to this termination settle-

ment (Pet. App. 14). It asserted, however, that its letter of April 3, 1956, to Air Force representatives setting forth the terms of the proposed termination for the convenience of the Government was held objectionable by these representatives because of the inclusion of a right of contract price redetermination and appeal (Pet. App. 14). The letter was accordingly revised and resubmitted by the petitioner (Pet. App. 14).

The petitioner never filed a claim under the termination for convenience provisions of the contract, nor did it appeal under the disputes clause of the contract (Pet. App. 19). Rather, it sought review of the action of the Air Force representatives by applying for relief under the First War Powers Act of 1941, 55 Stat. 838, as amended, 64 Stat. 1257 (Pet. App. 15). On November 15, 1957, the Air Force Contract Adjustment Board advised the petitioner that it did not have jurisdiction to review the case under that Act[1] (Pet. App. 15).

Seeking damages of $52,117.16, the petitioner instituted its suit in the Court of Claims.[2] That court dismissed for failure to state a claim upon which relief could be granted. The court held initially that

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[1] The petitioner's challenge of this determination below was rejected by the Court of Claims (Pet. App. 15). The petitioner has abandoned all contentions involving the First War Powers Act of 1941 in its petition in this Court.

[2] Previously, the petitioner had filed the same action in the United States District Court for the Southern District of Ohio, which court had dismissed for lack of jurisdiction in view of the amount of damages claimed (Pet. App. 15).

the mere statement of financial difficulties, for which the Government was in no way responsible, and the nature of the alleged threat of the Air Force representatives clearly did not demonstrate duress which would invalidate the settlement agreement (Pet. App. 16-17). In any event, the court below continued, even if there was present in this case the type of threat that invalidates a settlement agreement, such a conclusion only meant that the Government had effectuated a termination for its convenience, as provided for under the contract, which, along with price revision, could be accomplished unilaterally by the contracting officer (Pet. App. 17-19). The petitioner had never filed a claim or appealed this determination under the disputes clause of the contract and, thus, it was foreclosed from judicial relief by failure to exhaust its administrative remedies (Pet. App. 19).

ARGUMENT

This case presents no issue appropriate for this Court's consideration. No conflict of decisions is involved and no important issue of law. On the basic question of duress, the decision of the Court of Claims dismissing the petition rests upon the application of settled principles of contract law to the particular facts of this case. The decision, both as to duress and the other points in issue, is clearly correct and warrants no further review.

1. The principal question posed by the petitioner is whether, on the facts as pleaded below, there was duress that would invalidate its settlement agreement with the Government. Application of the concept of

duress, of course, is entirely dependent upon the factual circumstances of each individual case. *E.g.*, *Silliman* v. *United States*, 101 U.S. 465; *Mason* v. *United States*, 84 U.S. 67; *Fruhauf Southwest Garment Co.* v. *United States*, 126 C. Cls. 51; 5 Williston, *Contracts*, § 1603 (Rev. ed., 1937). Duress is normally applicable in the context of a threat of a wrongful act, but not where the only factor relied on is the use of a remedy provided by law or by contract, which is superimposed on a party's asserted precarious financial condition. 5 Williston, *Contracts*, §§ 1606, 1608 (Rev. ed., 1937).

As the Court of Claims ruled, however, these considerations are the only ones presented by the amended petition filed in that court, and thus the petitioner failed to state a claim based on duress. With regard to the financial aspect, the petitioner's sole complaint was that it was constrained to accept the Government's settlement offer of a reduction of $10,000 in the contract price because of its financial situation. It did not claim either that the Government was responsible for its financial predicament or that the contracting officers were even aware of this situation. Moreover, it did not allege, nor could it in view of the termination for convenience provisions of the contract, that the Government had no right to seek a reduction in the contract price.

In similar factual circumstances, the courts have consistently held the concept of duress inapplicable. *Silliman* v. *United States*, 101 U.S. 465; *Kohen* v. *H. S. Crocker Company*, 260 F. 2d 790 (C.A. 5); *W. R. Grimshaw Company* v. *Nevil C. Withrow Co.*,

248 F. 2d 896 (C.A. 8), certiorari denied, 356 U.S. 912; *Fruhauf Southwest Garment Co.* v. *United States*, 126 C. Cls. 51; *Foreign Trade Management Co., Inc.* v. *United States*, 109 C. Cls. 587. As the Eighth Circuit observed in *Grimshaw*, *supra*, in terms equally applicable here, there must be a showing "that the duress resulted from defendant's wrongful and oppressive conduct and not by plaintiff's necessities." 248 F. 2d at 904.

The petitioner's claim of duress based on the Government's threat to terminate the contract for default and to relet, if the petitioner did not agree to the $10,000 reduction, is equally lacking in merit. The Government's right to terminate the contract for default is as clearly provided in the contract as its right to terminate for its own convenience. And it is well established that threatened use of a remedy provided by contract does not constitute duress. *Hartsville Mill* v. *United States*, 271 U.S. 43; *Mason* v. *United States*, 84 U.S. 67; *W. R. Grimshaw Company* v. *Nevil C. Withrow Co., supra*; *Holland Page, et al.* v. *United States*, 120 C. Cls. 27. The petitioner's proper course of action, if it considered a termination for default unjustified in the circumstances, was to disregard the threat and "apply to the courts for redress" if the termination for default and assessment of excess costs eventuated. *Silliman* v. *United States*, 101 U.S. 465, 471; see also, *Hartsville Mill* v. *United States*, 271 U.S. 43; *W. R. Grimshaw Company* v. *Nevil C. Withrow Co., supra*.

The petitioner's reliance on cases such as *Ozark Sportswear Inc.* v. *United States*, 180 F. Supp. 391 (C. Cls.)

2. While the decision below that the Government exercised no duress disposes of the entire case, there is an additional ground on which the petitioner's claim falls. If, indeed, there was duress invalidating the settlement agreement, the petitioner's position is in no way improved. In that event, the action of the contracting officer, terminating the contract and reducing the contract price $10,000, plainly constituted a unilateral decision under the termination for convenience provisions of Article 21 of the contract. *Fruhauf Southwest Garment Co.* v. *United States*, 126 C. Cls. 51. As the Court of Claims observed with respect to Article 21 (Pet. App. 18-19), where the parties fail to agree, the contracting officer may terminate unilaterally and determine the amount due the contractor.

Consequently, if there was no agreement because of coercion, the only remedy available to the contractor was the filing of a claim and an appeal under the disputes clause as required by the termination for convenience provisions. *Fruhauf Southwest Garment Co., supra.* The contractor failed to take these necessary steps and thus was precluded from judicial relief below by failure to exhaust its administrative remedies.[1] *United States* v. *Blair*, 321 U.S. 730;

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and *Freund* v. *United States*, 260 U.S. 60, as unwarranted in that those cases are distinguishable factually on the specific bases set forth in the Court of Claims' opinion here (Pet. App. 16-17). See also, *Hartsville Mill* v. *United States*, 271 U.S. 43.

[1] The petitioner attempts to avoid the holding below as to failure to exhaust by urging two arguments, neither of which, upon analysis, has merit. First, assuming duress,

United States v. Callahan Walker Construction Co., 317 U.S. 56; *Fruhauf Southwest Garment Co., supra.*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY, 1960.

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the petitioner contends that the settlement agreement was not thereby invalidated or made void, but merely rendered "voidable", thus assertedly precluding appeal under the disputes clause. It is clear, however, that whatever labels the petitioner attaches to the agreement, it had the duty to raise the objections it had to the manner and nature of the termination by way of the disputes clause procedure. *Fruhauf Southwest Garment Co., supra.*

The petitioner's other argument on this issue is that it was somehow stripped of its right of administrative appeal by the contracting officer's demands with regard to its letter accepting termination for convenience, *supra*, pp. 3-4. This contention, however, overlooks the fact that if the agreement was invalidated by duress, the letter and all demands made of the petitioner with regard to the settlement agreement were also invalidated. In any event, the letter as finally submitted by the petitioner (Exhibit B to the amended petition below) did not purport in any way to waive rights under the contract.

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